Portcullis Trustnet (Singapore) Pte Ltd & Ors v Cardiff Ltd & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02(IM)-1110–06 OF 2014
MOHD HISHAMUDIN, DAVID WONG AND HAMID SULTAN JJCA
26 MAY 2015

Companies and Corporations — Secrecy provision — Offence under s 149(1) of the Labuan Companies Act 1990 ('LCA') if confidential information pertaining to affairs of Labuan company disclosed to 'any person' — Whether 'any person' included a 'Court' – Appellants sued by third party in Singapore High Court to produce documents relating to business and affairs of two companies incorporated under LCA — Appellants sought leave of Labuan High Court to disclose confidential documents about those companies in Singapore suit — Whether court had power to grant reliefs sought — Whether 'Court' in s 149 referred to either High Court of Malaya or High Court of Sabah and Sarawak and to proceedings before those courts and did not include High Court in Singapore — Whether provisions of s 149 of the LCA not vehicle to seek 'leave' or 'permission' from court to disclose confidential information pertaining to affairs of Labuan company — Whether s 149(1) of the Labuan Companies Act 1990 ('LCA') literally did not bar disclosure to any court of competent jurisdiction whether in Malaysia or elsewhere — s 149(1) of the Labuan Companies Act 1990 ('LCA')

The first and second appellants and a Malaysian incorporated company were part of the Portcullis group of companies, founded by the third appellant and headquartered in Singapore, which provided company incorporation, secretarial, administration and trustee services. The second appellant ('Portcullis Labuan') was a trust company incorporated under the Labuan Companies Act 1990 ('the LCA'). The appellants were sued in the High Court in Singapore by an Indian national ('Ram Mittal') for breaches of contract, trust and duty of care in respect of the setting up, management and administration of two companies by the appellants on his behalf. The two companies were the first respondent ('Cardiff Ltd') a Labuan incorporated company in which Portcullis Labuan held a share and a Malaysian incorporated company ('Hillcrest Realty'), which was wholly owned and controlled by Cardiff Ltd. For the purpose of his suit, Ram Mittal applied to the High Court in Singapore for an order that the first and second appellants produce for inspection and for the taking of copies, documents relating to the business and affairs of Cardiff Ltd and Hillcrest Realty. This caused the appellants to file an originating summons ('OS') before the High Court at Labuan for an order granting them leave to disclose confidential documents pertaining to the affairs of Labuan Portcullis, Cardiff Ltd and/or Hillcrest Sdn

Bhd for the purpose of the Singapore suit as s 149(1) of the LCA prohibited disclosure to 'any person' of any confidential documents/information pertaining to the business and affairs of a Labuan company or a foreign Labuan company. Unless disclosure was permitted under sub-s 149(4)(a), (b), (c) and (d) of the LCA, a breach of s 149(1) was an offence carrying a punishment of jail or a fine. The OS was made pursuant to ss 149(4)(a) and 149(6) of the LCA and/or the inherent jurisdiction of the High Court. Section 149(4)(a) provided that the prohibition against disclosure did not apply when, inter alia, it was 'lawfully required' to be made 'by any Court'. Section 149(6) stated that nothing in s 149 'shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the court which is relevant to those proceedings'. The High Court dismissed the OS holding, inter alia, that neither s 149(4)(a) nor s 149(6) empowered the court to grant leave or permission to any party to disclose confidential information pertaining to the affairs of a Labuan company; that the word 'Court' in s 149(6) referred to the High Court of Malaya or the High Court of Sabah and Sarawak and to proceedings before those courts and did not include the High Court in Singapore. In the instant appeal, the appellants contended, inter alia, that the High Court's decision created a legal 'lacuna', namely, whether the secrecy provision in s 149(1) of the LCA had extra-territorial effect to preclude disclosure of confidential documents/information pertaining to the business and affairs of a Labuan company in proceedings before a foreign court and whether, in fact, the High Court had no powers under its inherent jurisdiction to grant the leave sought for.

Held, dismissing the appeal:

(1) This court agreed with the reasoning and decision of the High Court. Section 2 of the LCA defined 'Court' as 'the High Court or a judge thereof'. The term 'High Court' was not defined by the LCA. But s 8(1) of the Interpretation Acts 1948 and 1967 provided that 'A reference to 'the High Court' is a reference, in relation to any particular case, to whichever of the High Courts established by the Federal Constitution has jurisdiction in that case'. By reason of the definition of the word 'Court' in s 2 of the LCA and having regard to s 8(1) of the Interpretation Acts, the word 'Court' in s 149 of the LCA could only mean the High Court of Malaya or the High Court of Sabah and Sarawak and could not include the High Court in Singapore (see para 18).

(2) Section 149(4)(a) of the LCA was not a vehicle to obtain 'leave' or 'permission' from the court to disclose confidential information pertaining to the affairs of a Labuan company. An application for disclosure could only be made under s 149(6) to either the High Court of Sabah and Sarawak or to the High Court of Malaya, as the case might be, and, even then, the application could only be made if there were

proceedings pending in the respective High Court in question and if it was necessary for the High Court to order production of a document that was relevant to the proceedings (see paras 33 & 35).

(3) (per **Hamid Sultan JCA, supporting**) Section 149(1) of the LCA literally did not prohibit disclosure to courts in Malaysia and/or other countries of any information through witnesses and/or affidavits. The key word in that section was 'any person' and the parties before this Court agreed that that term did not include a 'court'. The prohibition in s 149(1) did not extend to disclosure (or discovery) before the Singapore High Court (see paras 5(d)-(e)).

(4) (per **Hamid Sultan JCA, supporting**) If the Singapore High Court ordered disclosure or discovery, the appellants would be obliged to obey. In such circumstances, there were a number of cases to suggest that the penal provision of one country for an act or conduct which might be unlawful could not be imposed when the act or conduct was done lawfully upon an order of court in a different jurisdiction (see para 5(e)).

(5) The appellant's OS before the High Court was misconceived and this was not a case where the inherent jurisdiction of the court ought to have been invoked to provide a comfort letter for the appellant in relation to a prospective purported breach of s 149 of the LCA (see para 5(e)).

[Bahasa Malaysia summary

Perayu-perayu pertama dan kedua serta sebuah syarikat yang diperbadankan di Malaysia merupakan sebahagian daripada kumpulan syarikat Portcullis, yang diasaskan oleh perayau ketiga dan beribu pejabat di Singapura, yang menyediakan perkhidmatan pemerbadanan syarikat, kesetiausahaan, pentadbiran dan pemegang amanah. Perayu kedua ('Portcullis Labuan') adalah syarikat amanah yang diperbadankan di bawah Akta Syarikat Labuan 1990 ('ASL'). Perayu-perayu telah disaman di Mahkamah Tinggi di Singapura oleh warganegara India ('Ram Mittal') kerana pelanggaran kontrak, amanah dan kewajipan berjaga-jaga berkaitan penubuhan, pengurusan dan pentadbiran dua syarikat oleh perayu-perayu bagi pihaknya. Kedua-dua syarikat itu adalah responden pertama ('Cardiff Ltd') sebuah syarikat yang diperbadankan di Malaysia ('Hillcrest Realty'), yang dimiliki dan dikawal sepenuhnya oleh Cardiff Ltd. Bagi tujuan guamannya, Ram Mittal telah memohon kepada Mahkamah Tinggi di Singapura untuk perintah agar perayu-perayu pertama dan kedua mengemukakan untuk pemeriksaan dan untuk mengambil salinan, dokumen yang berkaitan dengan perniagaan dan urusan Cardiff Ltd dan Hillcrest Realty. Ini telah menyebabkan perayu-perayu memfailkan saman pemula ('SP') di hadapan Mahkamah Tinggi di Labuan untuk perintah yang memberikan mereka kebenaran mendedahkan dokumen rahsia berkenaan urusan Labuan Portcullis, Cardiff Ltd dan/atau Hillcrest Sdn Bhd bagi tujuan guaman Singapura kerana s 149(1) ASL menghalang pendedahan kepada '*any*

person' apa-apa dokumen/maklumat rahsia berkenaan perniagaan dan urusan syarikat Labuan atau syarikat asing Labuan. Kecuali pendedahan itu dibenarkan di bawah ss 149(4)(a), (b), (c) dan (d) ASL, satu pelanggaran s 149(1) adalah kesalahan yang membawa hukuman penjara atau denda. SP tu telah dibuat menurut ss 149(4)(a) dan 149(6) ASL dan/atau bidang kuasa yang sedia ada Mahkamah Tinggi. Seksyen 149(4)(a) memperuntukkan bahawa larangan terhadap pendedahan itu tidak terpakai apabila, antara lain, ia adalah '*lawfully required*' untuk dibuat '*by any Court*'. Seksyen 149(6) menyatakan bahawa tiada dalam s 149 '*shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the court which is relevant to those proceedings*'. Mahkamah Tinggi telah menolak keputusan SP itu, antara lain, bahawa s 149(4)(a) mahu pun s 149(5) tidak memberi kuasa kepada mahkamah untuk memberi kebenaran kepada mana-mana pihak untuk mendedahkan maklumat rahsia berkenaan urusan syarikat Labuan; bahawa perkataan 'Mahkamah' dalam s 149(6) merujuk kepada Mahkamah Tinggi Malaya atau Mahkamah Tinggi Sabah dan Sarawak dan kepada prosiding di hadapan mahkamah-mahkamah tersebut dan tidak termasuk Mahkamah Tinggi Singapura. Dalam rayuan ini, perayu-perayu berhujah, antara lain, bahawa keputusan Mahkamah Tinggi membentuk satu '*lacuna*' yang sah, iaitu, sama ada peruntukan kerahsian dalam s 149(1) ASL mempunyai kesan luar wilayah untuk menghalang pendedahan dokumen/maklumat rahsia berkenaan perniagaan dan urusan syarikat Labuan dalam prosiding di hadapan mahkamah asing dan sama ada, bahkan, Mahkamah Tinggi tiada kuasa di bawah bidang kuasa sedia adanya untuk memberi kebenaran yang dipohon.

Diputuskan, menolak rayuan:

(1) Mahkamah ini telah bersetuju dengan alasan dan keputusan Mahkamah Tinggi. Seksyen 2 ASL mentafsir '*court*' sebagai '*the High Court or a judge thereof*'. Istilah '*High Court*' tidak ditafsirkan oleh ASL. Namun s 8(1) Akta Tafsiran 1948 dan 1967 memperuntukkan bahawa '*A reference to 'the High Court' is a reference, in relation to any particular case, to whichever of the High Courts established by the Federal Constitution has jurisdiction in that case*'. Atas sebab tafsiran perkataan '*court*' dalam s 2 ASL dan berkenaan s 8(1) Akta Tafsiran, perkataan '*court*' dalam s 149 ASL hanya boleh bermaksud Mahkamah Tinggi Malaya atau Mahkamah Tinggi Sabah dan Sarawak dan tidak termasuk Mahkamah Tinggi di Singapura (lihat perenggan 18).

(2) Seksyen 149(4)(a) ASL bukan cara untuk mendapat '*leave*' atau '*permission*' daripada mahkamah untuk mendedahkan maklumat rahsia berkenaan urusan syarikat Labuan. Permohonan untuk pendedahan hanya boleh dibuat di bawah s 149(6) kepada Mahkamah Tinggi Sabah dan Sarawak atau kepada Mahkamah Tinggi Malaya, mengikut mana-mana yang berkenaan, dan, meskipun begitu, permohonan itu

hanya boleh dibat jika terdapat prosiding yang belum selesai berkaitan Mahkamah Tinggi yang dipersoalkan dan jika ia perlu untuk Mahkamah Tinggi memerintahkan dokumen yang relevan kepada prosiding dikemukakan (lihat perenggan 33 & 35).

(3) (oleh **Hamid Sultan HMR, menyokong**) Seksyen 149(1) ASL secara harfiah tidak melarang pendedahan kepada mahkamah di Malaysia dan/atau negara lain berhubung apa-apa maklumat melalui saksi dan/atau afidavit. Kata kunci dalam seksyen itu adalah '*any person*' dan pihak-pihak di hadapan mahkamah ini bersetuju bahawa istilah itu tidak termasuk '*court*'. Larangan dalam s 149(1) tidak termasuk pendedahan (atau penemuan di hadapan Mahkamah Tinggi Singapura (lihat perenggan 5(d)-(e)).

(4) (oleh **Hamid Sultan HMR, menyokong**) Jika Mahkamah Tinggi Singapura mengarahkan pendedahan atau penemuan, perayu-perayu hendaklah wajib mematuhi. Dalam keadaan berikut, terdapat sebilangan kes yang mencadangkan bahawa peruntukan keseksaan satu negara untuk tindakan atau kelakuan yang mungkin tidak sah tidak boleh dikenakan apabila tindakan atau kelakuan itu telah dilakukan dengan sah menurut perintah mahkamah dalam bidang kuasa berbeza (lihat perenggan 5(e)).

(5) SP perayu di hadapan Mahkamah Tinggi telah disalah anggap dan ini bukan kes di mana bidang kuasa sedia ada mahkamah patut diberikan untuk memperuntukkan perlindungan kepada perayu berkaitan pelanggaran s 149 ASL yang dikatakan bakal berlaku (lihat perenggan 5(e)).]]

Cases referred to

Associated Electric and Gas Insurance Services Ltd v European Re-Insurance Company of Zurich [2003] All ER (D) 308 (Jan); [2003] UKPC 11, PC (refd)

Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10, HC (refd)

Re B 15 ITELR 784, CA (refd)

See Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional [2015] 3 AMR 35, CA (refd)

United States v Panhandle Eastern Corp 118 FRD 346, CA (refd)

Legislation referred to

Companies Act 1965
Federal Constitution
Interpretation Acts 1948 and 1967 s 8(1)
Labuan Business Activity Tax Act 1990 s 22
Labuan Companies Act 1990 ss 149, 149(1), (4), (4)(a), (6)

Appeal from Originating Summons No LBN-24–10/7 of 2013 (High Court, Labuan)

Rishwant Singh and Carol Pey (Zul Rafique & Partners) for the appellant.
First respondent absent (and unrepresented).
Sharon Chong and Amy Hiews (Skrine) for the second respondent.

Mohd Hishamudin JCA:

INTRODUCTION

[1] Justice David Wong Dak Wah has read this judgment and agrees with it. However, Justice Hamid Sultan bin Abu Backer will be writing a separate supporting judgment.

[2] This is an appeal against the decision of the High Court of Sabah and Sarawak at the Federal Territory of Labuan given on 20 May 2014.

[3] On 13 February 2015 we dismissed the appeal with no order as to costs.

[4] We now give our grounds.

[5] This appeal concerns an application by way of an originating summons by all the three appellants before the High Court of Sabah and Sarawak at the Federal Territory of Labuan for an order under s 149(4)(a) and s 149(6) of the Labuan Companies Act 1990 ('the Act'). It is an application for permission or leave to disclose information pertaining to the affairs of three companies, two of which are established under the Act ('Labuan companies') while the third is a company established under the Companies Act 1965.

[6] We are advised by counsel of parties appearing before us that this is the first case in Malaysia on issues of secrecy and disclosure under the Act and that the judgment of this court on this appeal would set an important precedent that will have an impact on Labuan's reputation as an international business and financial center. The judgment will also affect the confidence of foreign investors in Malaysia.

[7] Portcullis Labuan (the second appellant) is a Labuan trust company incorporated in the Federal Territory of Labuan under the Labuan Companies Act 1990.

[8] The third appellant, Chong Kok Kong David, is the founder and chairman of the Portcullis Group. He is also a director of the first and second appellants. Now, what had happened was that, there are two brothers in India

by the name of Ram Parshotam Mittal ('Ram Mittal') and Ashok Kumar Mittal ('Ashok Mittal'). They are shareholders of a company incorporated in India called 'Hotel Queen Road Pvt Ltd' ('Hotel Queen'). A dispute arose between Ram Mittal on one side and Ashok Mittal and the other shareholders of Hotel Queen on the other, over the control of the hotel. Because of this dispute, since 2005, there had been various legal proceedings between the parties in India.

[9] On 3 November 2011, Ram Mittal commenced an action in the High Court of the Republic of Singapore ('Singapore suit') against the appellants. The suit was registered as High Court of Singapore Suit No 785 of 2011/T.

[10] The dispute in the Singapore suit focuses on two companies which Ram Mittal claims were set up, managed and administered by the appellants on his behalf. These companies are:

(a) the first respondent, Cardiff Ltd, a company incorporated in Labuan, Malaysia, with a paid-up capital of US$1 that is represented by a single ordinary share registered in the name of the second appellant, Portcullis Labuan; and

(b) a company incorporated in Malaysia, called 'Hillcrest Realty Sdn Bhd' ('Hillcrest Realty'), that is wholly owned and controlled by the first respondent, Cardiff Ltd.

[11] The crux of Ram Mittal's action in the Singapore suit is the allegation of breach of contract, breach of trust, and breach of duty of care against the appellants in respect of the setting up, management and administration of the first respondent and Hillcrest Realty.

[12] Ram Mittal alleges in his statement of claim, amongst other things, that it was 'at all times intended, understood, and agreed ...' between the parties that he was to be the sole and ultimate beneficial owner of the first respondent and Hillcrest Realty.

[13] The first and second appellants in their joint statement of defence assert, among other things, that the share of the first respondent was to be held by the second appellant in trust as a bare trustee and/or nominee for both Ram Mittal and Ashok Mittal. In other words, Ashok Mittal is also a beneficial owner of the shares in the first respondent and in Hillcrest Realty.

[14] This Singapore suit is still pending.

[15] On 26 March 2013, Ram Mittal filed an interlocutory application in the High Court of Singapore for an order that the first and second appellants produce for inspection and permit the taking of copies by Ram Mittal or his

solicitors of documents that relate to the business and affairs of the first respondent and Hillcrest Realty.

[16] The originating summons application before the High Court of Labuan in the application before the High Court of Labuan, the appellants seek an order to grant them liberty to disclose information pertaining to affairs of the second appellant (Portcullis Labuan), the first respondent (Cardiff Ltd) and/or Hillcrest Sdn Bhd for the purpose of the Singapore suit. The relevant prayers in the originating summons read as follows:

(a) the applicants, its servants, agents, representatives and/or legal advisers (both internal and external) be granted liberty to refer to, disclose and/or exhibit in submissions and filings in the High Court of the Republic of Singapore and on appeal therefrom any record, book, register, correspondence, material, information, particulars and/or documents relating to the business and affairs of the second applicant (Portcullis Labuan), the respondent (Cardiff Ltd) and/or Hillcrest Realty Sdn Bhd for the purpose of Suit No 785 of 2011/T presently pending before the High Court of the Republic of Singapore;

(b) no person, including with limitation, Ram Parshotam Mittal, the plaintiff in Suit No 785 of 2011/T and the applicants, the parties' servants, agents, representatives and/or legal advisers (both internal and external), shall publish or otherwise disclose to any external party the substance of any record, book, register, correspondence, material, information, particulars or documents disclosed by the applicants in Suit No 785 of 2011/T relating to the business and affairs of the second applicant (Portcullis Labuan), the respondent (Cardiff Ltd) and/or Hillcrest Realty Sdn Bhd save in submissions of other filings in the High Court of the Republic of Singapore and on appeal therefrom;

[17] It is to be observed that Hillcrest Realty is not a Labuan company but an ordinary company established under the Companies Act 1965. Nevertheless information pertaining to the business and affairs of this company is also included in the appellants' originating summons application. The reason for so including this particular company is explained in the supporting affidavit as follows:

> Although Hillcrest is not incorporated in Labuan, I am advised and verily believe that section 149 of the Act may nevertheless apply in respect of documents and information relating to the business and affairs of Hillcrest. I am advised and verily believe that section 149(1) of the Act takes a broad approach to the revelation of material or information pertaining to the business and affairs of a Labuan company. Further, the purpose of section 149(1) of the Act is that investors in Labuan offshore companies place very great importance on the privacy surrounding their investment. In light of the above, as Hillcrest is wholly owned and controlled by the respondent, section 149 of the Act may preclude the applicants from disclosing

documents and information relating to the business and affairs of Hillcrest.

[18] After this application was filed, Ashok Mittal applied to intervene and was added as the second respondent in the originating summons. He is opposing any disclosure pertaining to the affairs of Cardiff Ltd on the ground that the disclosure of information pertaining to the affairs of a Labuan company are protected by s 149 of the Labuan Companies Act 1990.

[19] Ram Mittal, the plaintiff in the Singapore suit, is not a party in the originating summons application.

[20] The first respondent, Cardiff Ltd, did not participate in the originating summons proceedings; neither did it participate in the hearing of this appeal.

[21] The appellants have submitted an affidavit in support of their application. It is deposed by one Tan Sze Lian Celine (NRIC No S0106658G), a Singaporean citizen. She is a director of the first appellant and an alternate director of the second appellant.

[22] The appellants, by their affidavit, states that in order to defend the claims made against them in the Singapore suit by Ram Mittal, they are compelled to disclose information pertaining to the business affairs of the Labuan companies (meaning, Portcullis Labuan and Cardiff Ltd) and Hillcrest Realty. The appellants also deposed that Ram Mittal has filed an interlocutory application against the first and second appellants in the Singapore suit for inspection and taking of copies of documents relating to the business affairs of the Labuan companies and Hillcrest Realty. Thus, the appellants have pleaded in this application that they would run the risk of contravening s 149(1) of the Labuan Companies Act 1990 unless leave is given by this court under ss 149(4)(a) and 149(6).

SECTION 149 OF THE ACT

[23] For ease of reference, we reproduce below the provisions of s 149:

> Section 149 Secrecy
>
> (1) No person who has by any means access to any record, book, register, correspondence, document, material or information relating to the business and affairs of the Labuan company or foreign Labuan company shall give, reveal, publish or otherwise disclose to any person such record, book, register, correspondence, document, material or information.
>
> (2) All proceeding, other than criminal proceeding, relating to a Labuan company or foreign Labuan company shall be commenced in any Court,

either under the provisions of this Act or for determining the rights or obligations of officers, members or debenture holders.

(3) Such proceeding and any appeal therefrom shall, unless the Court otherwise orders, be heard in camera and no details of the proceeding shall be published by any person without leave of the Court.

(4) The provisions of subsection (1) shall not apply –

when lawfully required to make such disclosure by any Court or under the provisions of any law being enforced by the Authority;

(a) for the purpose of the performance of the Authority's supervisory functions as may be provided for under any written law;

(b) When lawfully required pursuant to section 22 of the Labuan Business Activity Tax Act 1990; or

(c) When duly authorized by the Labuan company or the foreign Labuan company.

(5) A person who contravenes subsection (1) shall be guilty of any offence against this Act.

Penalty: Imprisonment for three years or one million ringgit or both.

(6) Nothing in this section shall prevent any Court from exercising its discretion to require a person to produce any document or to give anyevidence in any proceeding before the Court which is relevant to those proceedings.

[24] By the Offshore Companies (Amendment) Act 2010, the Offshore Companies Act 1990 (Act 441) was amended to become the Labuan Companies Act 1990.

[25] The respective definitions of 'Court' and 'court' in s 2 of the Act are as follows:

'Court'

Means the High Court or a judge thereof;

'court'

Means a court of competent jurisdiction;

[26] The definition of 'court' was inserted by s 2 of the Offshore Companies (Amendment) Act 2010; and by this amendment the Act has made a distinction between 'Court' and 'court'.

[27] The term 'High Court' is not defined by the Act. But s 8(1) of the Interpretation Acts 1948 and 1967 provides:

References to 'the High Court', 'the Minister' and 'the Treasury'

8(1) A reference to 'the High Court' is a reference, in relation to any particular case, to whichever of the High Courts established by the Federal Constitution has jurisdiction in that case.

DECISION OF THE HIGH COURT

[28] In dismissing the originating summons, the learned High Court judge analysed s 149 and takes the following view:

> However, in my view, sub-s (4)(a) is not a provision that empowers the court to grant leave or permission to any party to disclose confidential information pertaining to a Labuan Company in breach of sub-s (1). My reasoning is based on the scheme of section 149. Sub-section (1) enacts generally that no person may disclose confidential information pertaining to the affairs of a Labuan Company. Sub-section (5) stipulates a penal sanction for the contravention of sub-s (1). However, sub-s (4) also provides four circumstances in paras (a) to (d) where sub-s (1) shall not apply. Thus, another way of reading sub-s (4) is that it provides statutory defences if sub-s (1) is breached. If the applicants' intended disclosure of confidential information pertaining to the affairs of the said Labuan Companies is justifiable under sub-s (4)(a)-(d), they would be protected from prosecution under sub-s (5). However, it is essential to note that sub-s (4) is not a vehicle to obtain 'leave' or 'permission' from the court to disclose confidential information pertaining to the affairs of a Labuan Company. Therefore, in my opinion, the application for leave or permission to disclose confidential information under sub-s 4(a) is misconceived.
>
> I shall now consider the application under sub-s (6). Sub-s (6) reads as follows:
>
> > (6) Nothing in this section shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the Court which is relevant to those proceedings.
>
> In my view, sub-s (6) cannot assist the applicants in the instant application for the following reasons. My view is that 'the Court' and 'any Court' referred to in this sub-s is the High Court of Malaya or the High Court of Sabah and Sarawak. As pointed out by counsel for Ashok Kumar Mittal, 'Court' in s 2 of the Labuan Companies Act 1990, means the 'High Court' which must necessarily refer to the High Court of Malaya or High Court of Sabah and Sarawak. It is also my view that sub-s (6) only applies if there are proceedings afoot in this court and if it is necessary for the court to order production of a document that is 'relevant'. Therefore, the words 'any Court' and 'the Court' in sub-s (6) refers to the same court that is hearing a matter concerning a Labuan Company. Otherwise, the words 'to produce any document or to give any evidence in any proceeding before the Court which is relevant to those proceedings' would be meaningless. In the instant case, permission or leave is sought to disclose confidential information in proceedings before the Singapore High Court. My final reason is that sub-s (6) is not a vehicle for any party to apply for leave or permission to disclose confidential information pertaining to a Labuan Company. Sub-section (6) does not expressly or impliedly provide for such

an application. It only enacts, perhaps for avoidance of doubt and out of abundance of caution, that the court's power to order disclosure of documents which may be relevant to the proceedings before it is not fettered by sub-s (1). Therefore, I am of the view, the instant application is misconceived as the court is not empowered to grant the orders sought in this application under sub-s (6). The originating summons is hereby dismissed with no order as to costs.

SUBMISSION OF THE APPELLANTS

[29] Learned counsel for the appellants submits before us that for the purpose of s 149 of the Act the word 'Court' must be interpreted to also include the High Court of Singapore.

[30] Learned counsel for the appellants also refers to the general common law principles that govern disclosure in a trustee-beneficiary relationship with a view to persuading us to grant the application. Among the cases cited was *Re B* 15 ITELR 784, a judgment of the Court of Appeal of Guernsey.

Submission of the second respondent

[31] Learned counsel for the second respondent on the other hand contends that the word 'Court' in s 149(4)(a) and s 149(6) of the Act can only refer to the High Court of Malaya or the High Court of Sabah and Sarawak; and cannot include the Singapore High Court.

[32] Learned counsel further submits that it is misconceived for the appellants to invoke s 149(4)(a) and s 149(6) of the Act as these provisions are never intended by the Act to be the vehicle for such an application.

[33] Learned counsel also made a general submission to the effect that the purpose of s 149 of the Act is to provide investors in Labuan companies with a secrecy and confidentiality structure for the conduct of their business. And that this being the case, investors in Labuan companies have a legitimate expectation that their legal rights to confidentiality will be protected.

OUR DECISION

[34] It appears to be common ground (and rightly so) that the second appellant (Portcullis Labuan) and the first respondent (Cardiff Ltd) are Labuan companies, and that any disclosure as to their business affairs to any person would be in contravention of sub-s (1) of s 149 of the Act.

[35] On our part, in the present case, we agree with the reasoning and decision of the learned High Court judge.

[36] In our judgment, by reason of the definition of the word 'Court' in s 2 of the Act and the provision of s 8(1) of the Interpretation Acts 1948 and 1967, we are in agreement with learned counsel for the second respondent and learned High Court judge that the word 'Court' in s 149 can only mean the High Court of Malaya or the High Court of Sabah and Sarawak; and cannot include the High Court of Singapore.

[37] We agree with learned counsel for the second respondent that sub-s (4)(a) of s 149 is not a vehicle to obtain 'leave' or 'permission' from the court to disclose confidential information pertaining to the affairs of a Labuan company.

[38] And we would add that we accept the submission of learned counsel for the second respondent that, with regard to the invocation of s 149(4)(a) by the appellants to permit disclosure, it is misconceived for the appellants to argue that they were 'lawfully required' (these words 'lawfully required' are the words used by s 149(4)(a)) to make the disclosure by either the High Court of Malaya or the High Court of Sabah and Sarawak; for, if at all any order were to be made by the High Court of Sabah and Sarawak at Labuan, pursuant to the appellants' originating summons application, it would be made pursuant to the appellants' voluntary application. There is no element of being 'lawfully required'.

[39] We further subscribe to the view that an application for disclosure could only be made under sub-s (6) of s 149 to High Court of Sabah and Sarawak or to High Court of Malaya, as the case may be; and, even then, the application could only be made if there are proceedings pending in the High Court in question and that it is necessary for the High Court to order production of a document that is relevant to the proceedings.

[40] Appeal dismissed with no order as to costs.

Hamid Sultan JCA:

[41] The appellants appeal against the decision of the learned High Court judge who refused the application for leave to disclose documents in the Singapore High Court pursuant to s 149 of the Labuan Companies Act 1990 ('LCA 1990') and/or the inherent jurisdiction came up for hearing on 9 February 2015. Upon hearing, we were unanimous in dismissing the appeal. I have informed the parties that my reason for dismissing the appeal is not on the same grounds of that of my learned brothers Mohd Hishamudin bin Mohd Yunus JCA and David Wong Dak Wah JCA. This judgment must be read with the judgment of my learned brother Mohd Hishamudin bin Mohd Yunus JCA to appreciate the facts and issues in the right perspective. I now give my reasons for my decision.

BRIEF FACTS

[42] The facts, law and the contention of the parties has been well articulated by the learned High Court judge and I do not wish to repeat the same save to the construction of s 149 of the LCA 1990 and its applicability before the High Court which the appellant have filed as a cautionary measure to ensure not to attract any penal sanction for disclosure of documents pursuant to s 149 of the LCA 1990. The section reads as follows:

> Section 149 Secrecy.
>
> (1) No person who has by any means access to any record, book, register, correspondence, document, material or information relating to the business and affairs of the Labuan company or foreign Labuan company shall give, reveal, publish or otherwise disclose to *any person* such record, book, register, correspondence, document, material or information (Emphasis added.)
>
> (2) All proceeding, other than criminal proceeding, relating to a Labuan company or foreign Labuan company shall be commenced in any Court, either under the provisions of this Act or for determining the rights or obligations of officers, members or debenture holders.
>
> (3) Such proceeding and any appeal therefrom shall, unless the Court otherwise orders, be heard in camera and no details of the proceeding shall be published by any person without leave of the Court.
>
> (4) The provisions of subsection (1) shall not apply–
>
> (a) when lawfully required to make such disclosure by any Court or under the provisions of any law being enforced by the Authority;
>
> (b) for the purpose of the performance of the Authority's supervisory functions as may be provided for under any written law;
>
> (c) when lawfully required pursuant to section 22 of the Labuan Business Activity Tax Act 1990; or
>
> (d) when duly authorized by the Labuan company or the foreign Labuan company.
>
> (5) A person who contravenes subsection (1) shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for three years or one million ringgit or both.
>
> (6) Nothing in this section shall prevent any Court from exercising its discretion to require a person to produce any document or to give any evidence in any proceeding before the Court which is relevant to those proceedings.

[43] It is not in dispute that the first appellant is a Labuan Trust Company incorporated under the Labuan Companies Act 1990. The first appellant has nexus to the second and third appellant. Two brothers Ashok Kumar Mittal

and Ram Parshotam Mittal who are Indian citizens are engaged in a caustic dispute among themselves in a litigation and the related action is pending in Singapore High Court. Both of the brothers have nexus or claim or link or issues and/or interest, etc in respect of the relevant parties to this appeal. In the Singapore suit, Ram Parshotam Mittal has sued the appellants in respect of the respondent company. The appellants here need to disclose information of the first appellant in the Singapore suit as Ram Parshotam Mittal has filed an interlocutory application against the first and second appellants for disclosure of documents. If disclosure is made, the appellants take the view that they may run the risk of breaching s 149 of the LCA 1990. Hence, the suit. It is of interest to note that Ashok Kumar Mittal intervened in this suit and has been made the respondent. His purpose is to oppose disclosure.

[44] It will be useful to reproduce the memorandum of appeal to appreciate the argument of the appellants in the right perspective. The memorandum of appeal reads as follows:

(1) The High Court erred in law and in fact in dismissing the appellant's application for leave to disclose documents in the Singapore High Court for the purpose of suit No 785 of 2011/T presently pending before the Singapore High Court, pursuant to ss 149(4)(a) and 149(6) of the Labuan Companies Act, 1990 (the 'Act') and/or the inherent jurisdiction of the High Court.

(2) The High Court erred in law in holding that ss 149(4) and/or 149(6) of the Act are not a vehicle to obtain 'leave' or 'permission' from the court to disclose any record, book, register, correspondence, document, material or information relating to the business and affairs of a Labuan company ('Confidential Documents and Information').

(3) The High Court erred in law in holding that s 149(6) of the Act only applied if there were proceedings afoot in the High Court of Malaya or High Court of Sabah and Sarawak.

(4) The High Court erred in law in holding that s 149(6) was only enacted for avoidance of doubt and out of abundance of caution so that the court's power to order disclosure of the confidential documents and information is not fettered by the secrecy provision under s 149(1) of the Act.

(5) The High Court erred in law and in fact in deciding that the originating summons was misconceived and that the High Court was not empowered to grant the orders sought in the originating summons.

(6) In so deciding, the High Court fell into error in failing to appreciate that s 149(4)(a) and/or the inherent jurisdiction of the court empowers the High Court to grant leave or permission to any party and/or make an order for disclosure of the confidential documents and information.

(7) In reaching its decision, the High Court respectfully erred in failing to appreciate that its decision resulted in there being a lacuna in the law, namely whether:

(a) the secrecy provision under s 149(1) of the Act has extra-territorial effect and/or precludes disclosure of confidential documents and information in legal proceedings before that foreign court; and

(b) the court has powers under its inherent jurisdiction to grant leave or permission to any party and/or make an order to disclosure of the confidential documents and information.

[45] I have read the appeal record and the able submissions of the learned counsel for the respective parties. I agree with the learned High Court judge that the application for leave is misconceived but for different reasons. My reasons are as follows:

(a) it is trite that the laws of one country cannot restrain the jurisdiction and/or power of the court in another country and in this case Singapore. It is also well established that when courts in exercising their discretionary powers will often have due regards to the relevant laws of friendly countries if it is in issue under the comity and/or reciprocity principle;

(b) reading s 149 as a whole, it does not deal with jurisdiction and/or powers of other courts and/or interfere with the discretionary relief of courts of other countries;

(c) even if it is Malaysia, the secrecy provision stated in s 149(1) is not absolute and is qualified by s 149(4) and (6) of the LCA 1990. As a general rule provision for secrecy, privacy and/or confidentiality is often shun by the courts when such disclosure is needed for the good of the public (see *United States v Panhandle Eastern Corp* 118 FRD 346 (Del 1988); *Associated Electric and Gas Insurance Services Ltd v European Re-Insurance Company of Zurich* [2003] All ER (D) 308 (Jan); [2003] UKPC 11; *Esso Australia Resources Ltd v Plowman* [1995] 183 CLR 10). No information of any kind can be absolutely restrained by agreement of the parties and/or statute from the purview of the courts under our Federal Constitution in breach of the fundamental jurisprudence relating to accountability and transparency to the court see (*Teh Guat Hong v Perbadanan Tabung Pendidikan Tinggi Nasional* [2015] 3 AMR 35). In addition statutes such as Money Laundering Act in different countries will require disclosures and countries may have international obligation to ensure absolute secrecy provision are not placed in their legislation which may promote money laundering activities.

(d) s 149(1) literally does not prohibit disclosure to courts in Malaysia and/or other countries any information through witnesses and/or affidavits. The restriction is only to documents as per s 149(6) of the LCA 1990. The key

word in the section in relation to its construction is 'any person'. We have enquired with the parties before the court and they have informed us that 'any person' is not in reference to court. Learned counsel for the appellant on this issue by way of supplementary submissions says:

Statutory Definition of 'Person'

2. None of the below listed Acts of Parliament (which specifically have to do with Labuan) define a 'person' to include a 'court'.

3. s 2 Labuan Companies Act 1990

'person includes a corporation, partnership, a body of persons and a corporation sole.

4. s 2 Offshore Insurance Act 1990 (repeated by the Labuan Financial Services and Securities Act 2010) [Act 704] –

'person' includes any individual, corporation, statutory body, local authority, society, trade union, co-operative society, partnership, and any other body, organization, association or group of persons, whether corporate or unincorporated.

5. s 2 Labuan Business Activity Tax Act 1990 –

'person' includes a corporation, a partnership, a body of persons and a corporation sole.

6. s 2 Labuan Trusts Act 1996

'person' includes a corporation, a partnership, a body of persons, corporate or unincorporated, and a corporation sole.

7. s 2 Labuan Offshore Securities Industry Act 1998 (repealed by the Labuan Financial Services and Securities Act 2010 [Act 704]) –

'person' includes a mutual fund, an offshore company, a partnership, a unit trust and a body of persons, whether incorporated or unincorporated.

8. s 2 Labuan Financial Services and Securities Act 2010 –

'person' includes a corporation, a partnership, a body of persons, corporate or unincorporated, and a corporation sole.

9. s 2 Labuan Foundations Act 2010 –

'person' includes a corporation, a partnership, a body of persons, corporate or unincorporated, and a corporation sole.

10. In so far as ss 3 and 66 Interpretation Acts 1948 and 1967 are concerned –

Section 3 – 'person' includes a body of persons, corporate or unincorporated.

Section 66 – 'person' and 'party' includes any body of persons, corporate or unincorporated.

11. We have undertaken a more exhaustive search of various Acts of the Malaysian Parliament. The results of the research appear in Appendix A hereto. None of the Acts of Parliament (in Appendix A) define a 'person' to include a 'court'.

(e) in my considered view the prohibition in s 149(1) does not extend to disclosure (or discovery) before the Singapore High Court. If Singapore court orders disclosure or discovery, the appellants will be obliged to obey failing which committal proceedings may issue. In such circumstances, there are a number of cases to suggest penal provision of one country for an act or conduct which may be unlawful cannot be imposed when the act and/or conduct was done lawfully upon an order of court in different jurisdiction. I do not think it is necessary to explore this jurisprudence for the purpose of this appeal, save to say that the appellants' application before the High Court was misconceived and this is not a case the inherent jurisdiction of the court ought to be invoked to provide a comfort letter for the appellant in relation to a prospective purported breach of s 149 of the LCA 1990.

[46] For reasons stated above, I dismiss the appeal with no order as to costs as per the unanimous decision of this court. The deposit is to be refunded.

[47] I hereby order so.

Appeal dismissed

Reported by Ashok Kumar